

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/10/2003

CORAM

THE HON'BLE MRS. JUSTICE PRABHA SRIDEVAN

C.R.P.P.D.NO.493 of 2003

and

C.M.P.No.3224 of 2003

1.Maria Ronikkam

2. Lourdu Balammal

3. Joseph Raj

4. Michael Raj

5. Justin Raj

6. Mariya Selvi

7. Juliyana ammal ... Petitioners

-Vs-

Aruldass ... Respondent

Prayer :: Civil Revision Petition against the Order and
Decreetal order in I.A.No.595 of 2002 in O.S.No.102 of 1973 on the file of
Additional District Munsif, Nagercoil dated 02-12-2002.

!For petitioners :: Mr. V. Raghavachari

^For respondent :: Mr. C. Godwin

:ORDER

The petitioners are the alienees and the legal representatives
of the alienees from defendants 1 and 2 in O.S.No.102 of 1973. The respondent
was the plaintiff. The plaintiff is the son of the second defendant. The
first defendant is the paternal uncle of the second defendant. After the
death of the respondent's father, the second defendant married her husband's
brother namely the first defendant. The respondent claimed that he was
entitled to half share in the plaint schedule property and the first defendant
was entitled to the remaining half share; and that to defeat the rights of the
plaintiff, the defendants 1 and 2 had alienated the suit schedule properties

without legal necessity. The respondent claimed that the sale deeds executed in favour of the defendants 3 to 5 who are the petitioners herein are void. The defendants 1 and 2 remained ex parte, the alienees viz., defendants 3 to 5 are the contesting parties. The defendants 3 to 5 claimed that the respondent got only one-third share in the suit properties and not half share. This was not accepted by the Trial Court. The Trial Court held that the parties are governed by the Travancore Cochin Christian Succession Regulation and the provisions of the Indian Succession Act are not applicable and declared that the respondent and the first defendant were entitled to one-half share each in the suit properties.

2. The appeal filed thereagainst was dismissed and the Second Appeal No.1117 of 1983 was also dismissed on 11-08-1998. The substantial question of law that was framed for consideration in the second appeal was whether the Courts below were wrong in applying Section 30 instead of 60 of the Limitation Act to the facts of the case. No other point was raised.

3. In 2002, the petitioners filed an application for review of the preliminary decree dated 11-09-1980 on the ground that since the Supreme Court in Mrs. MARY ROY V. STATE OF KERALA (AIR 1986 SC 1011) had held that the Indian Succession Act is alone applicable to all Christians in Kanyakumari District, the preliminary decree should be reviewed and amended accordingly. This was dismissed by the Court below and therefore, this revision has been filed.

4. The learned counsel for the petitioner cited the following decisions:

(1) S. Krishnamurthy Vs. Thakkar K.G. Krishnaswamy (2003 II CTC 655), where the salient features relating to review were summarised:

"(a) There must be an error apparent on the face of the record; e.g. If the Court does not effectively deal with and determine an important issue in the case on which depended the title of the plaintiff and the maintainability of the suit, that would be an error apparent on the face of the record.

(b) A misconception by the Court of a concession made by the Advocate or of the attitude taken (up) by the party must be regarded as sufficient reason analogous to an error on the face of the record and it can furnish a ground for review though it will not generally appear on the record, but will have to be brought before the Court by way of an affidavit and this can be done only by way of review.

(c) To decide against a party on matters which do not come within the issues on which the parties went to trial clearly amounts to an error apparent on the face of the record. It is futile to speculate as to the effect these matters had on the mind of the Court in comparison with the effect of the other points.

(d) No error can be an error apparent on the face of the record if it is not self evidence and if it requires an examination or argument to establish it, may afford a satisfactory basis for decision in the majority of cases. There must be cases in which even this test might break down, because judicial opinions also differ and an error that might be considered by one Judge as self evident may not be so considered by another. Thus what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very

nature and it must be left to be determined judicially on the facts of each case.

(e) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument or long-drawn process of reasoning, one could point to the error and say there is a substantial point of law which stares one in the face and there could reasonably be no two opinions entertained about it, a clear case of an error apparent on the face of record is made out.

There cannot be a reappraisal of the entire evidence on record for finding the error. If there is reappraisal, it would amount to exercise of appellate jurisdiction, which is not permissible.

(f) Judgment by one single Judge review by another is not maintainable and the proper remedy is an appeal.

(g) Court's inherent powers can be exercised to remedy a mistake. Injustice done should be corrected by applying the principle *actus curiae nemi-nem gravabit* - an act of the Court shall prejudice no one. The person aggrieved must spell out the injustice done to him.

(h) The Court has a bounden duty to correct its own error. Acquiescence, waiver or estoppel is inapplicable.

(i) Justice is a virtue which transcends all barriers. Even the law bends before justice. The order of the Court should not prejudice anyone.

(j) Violation of principles of natural justice will enable Court to act *suo motu ex debito justitiae* and review decision. Review power can be exercised to avoid abuse of process or miscarriage of justice. It can be exercised where there are serious irregularities in proceedings or violation of principles of natural justice or mistake committed on erroneous assumption of fact resulting in miscarriage of justice."

(2) *ANNAPOORNI VS. JANAKI* (1995 I LW 141) was relied on. In this case, at a stage when execution petition was pending, M. Srinivasan, J., as he then was, held that the District Munsif had completely ignored the provisions of the Hindu Succession Act and failed to note that the plaintiff would be entitled to only one and half share of the property even on the basis set out in the case of the plaint. Thereafter the learned Judge exercising his powers under Section 115 and Article 227 of the Constitution of India held that if a provision of law is completely disregarded by a Subordinate Court that will be a ground for exercising the powers of under Section 115, CPC and that this Court cannot keep silent and allow the decree to be in force particularly when it causes grave injustice."

(3) Reliance was placed on *RUPA ASHOK HURRA VS. ASHOK HURRA* (2002 II (4) SCC 388) where the Supreme Court held that under Article 137, 129, 141 and 142 reconsideration under inherent powers of Supreme Court is possible through a curative petition even after the dismissal of the review petition to prevent abuse of court's process and to cure the gross miscarriage of justice and that such a situation might arise only in rarest of rare cases and if they do the duty to do justice should prevail over the policy of certainty of judgment. The learned Judge also stated the grounds for such curative petitions which though could not be enumerated exhaustively would justify the relief *ex debito justitiae* if he establishes (1) violation of the principles of natural justice in that he was not a party to the lis, but the judgment adversely affected his

interests of, if he was a party to the lis, he was not served with notice of the proceedings and the matter proceeded as if he had notice, and (2) where in the proceedings a learned Judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner.

(4) M.A. MURTHY VS. STATE OF KARNATAKA AND ORS (2003 (7) Scale 154) was also referred to and the following head notes are relevant:

"Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception.

Prospective over-ruling is a part of the principles of constitutional cannon of interpretation and can be resorted to by this Court while superseding law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases."

(5) Relying upon these judgments the learned counsel said that the pronouncement in Mary Roy's case is the law of the land and any judgment contrary to this must be set aside and the cause of justice should not be allowed to suffer.

5. The learned counsel for the respondent on the other hand would submit that though several points were urged at the time of trial, the first appeal and the second appeal this point was not one of them. It was also submitted that by the time the second appeal was heard by this Court the judgment in Mary Roy's case had been pronounced and that ground was not urged before this Court. It was also submitted that after the second appeal, the judgment of the Trial Court had become merged in the judgment in the second appeal and therefore, the Trial Court cannot review its judgment after it had merged with the judgment and decree in second appeal.

6. In 1995 I LW 141(cited supra) the learned Judge, cut out the Gordian knots of technicalities to do justice. Hurra's case also underscores the importance of doing justice(emphasis supplied) over all other concerns. The change in the legal position may have been applied in the instant case, had it been brought to the notice of this Court when the second appeal was argued. But this issue was never raised as a ground of challenge at any stage. It is true that in the written statement, O.S.No. 102 of 1973, the petitioners had claimed that the respondent and the defendants 1 and 2 each had one third share. This is in accordance with the law laid down in Mary Roy's case, which came six years later. The Trial Court applied the law as per D. CHELLIAH NADAR VS. G. LALITHABAI (1977 I MLJ 454), and in the first appeal there was no change, since the focus was more on the issue of limitation as can be seen from the substantial question of law framed in the second appeal. But the second appeal was disposed of only in 1998. It was open to the appellant in the second appeal to have framed an additional question of law. They did not.

It is seen in 1995 I LW 141 (cited supra) that even when the defendant/mother had allowed the decree to be ex parte contrary to the provision of the Hindu Succession Act, this Court, set right the injustice in execution proceedings.

7. According to Mr. V. Raghavachari, learned counsel for the petitioner the petitioners are in a better position because even before the execution petition they have filed the review. May be. But the difficulty here is one of merger. The judgment and decree of the Trial Court had merged with the decree in the second appeal.

8. In KUNHAYAMMED VS. STATE OF KERALA (2000 (6) SCC 359 (a three Judge Bench)) the doctrine of merger has been explained.

Doctrine of merger - Nature and concept of - Restated - Held, it is merely a common law doctrine based on principles of propriety in the hierarchy of judicial system - It postulates merger of the subordinate forum's decision in the decision of the appellate or revisional forum modifying, reversing or affirming such decision - Thereafter only the latter and not the former exists in the eye of law - However, the doctrine is not of universal or unlimited application - Its applicability, has to be determined keeping in view the nature of jurisdiction exercised by the superior forum and the content or subject-matter of the challenge - Nature of Supreme court's jurisdiction at SLP and post-leave stage clarified - Effect of dismissal at the stage of special leave by non-speaking/ speaking order and dismissal by nonspeaking order after grant of special leave considered in detail - Constitution of India, Art. 136 - Effect of grant/dismissal of SLP. ...

10. In GOJER BROS. (P) LTD. V. RATAN LAL SINGH this Court made it clear that so far as merger is concerned on principle there is no distinction between an order of reversal or modification or an order of confirmation passed by the appellate authority. In all the three cases the order passed by the lower authority shall merge in the order passed by the appellate authority whatsoever be its decision - whether of reversal or modification or only confirmation. Their Lordships referred to an earlier decision of this Court in U.J.S. CHOPRA V. STATE OF BOMBAY wherein it was held:

"A judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties ... would replace the judgment of the lower court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the court below."

11. In S.S. Rathore V. State of M.P. A larger Bench of this Court (seven Judges) having reviewed the available decisions of the Supreme Court on the doctrine of merger, held that the distinction made between courts and tribunals as regards the applicability of doctrine of merger is without any legal justification; where a statutory remedy was provided against an adverse order in a service dispute and that remedy was availed, the limitation for filing a suit challenging the adverse order would commence not from the date of the original adverse order but on the date when the order of the higher authority disposing of the statutory remedy was passed. Support was taken from doctrine of merger by referring to CIT V. Amritlal Bhogilal & Co. and several other decisions of this Court.

12. The logic underlying the doctrine of merger is that there cannot be more

than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."

9. In *ABBAI MALIGAI PARTNERSHIP FIRM AND ANOTHER V. K. SANTHAKUMARAN* (1998 (7) SCC 386) it was held as follows:

"The manner in which the learned Single Judge of the High Court exercised the review jurisdiction, after the special leave petitions against the selfsame order had been dismissed by this Court after hearing learned counsel for the parties, to say the least, was not proper. Interference by the learned Single Judge at that stage is subversive of judicial discipline. The High Court was aware that the SLPs against the orders dated 7-1-1987 had already been dismissed by this Court. The High Court, therefore, had no power or jurisdiction to review the selfsame order, which was the subject-matter of challenge in the SLPs in this Court after the challenge had failed. By passing the impugned order on 7-4-1994, judicial propriety has been sacrificed. After the dismissal of the special leave petitions by this Court, on contest, no review petitions could be entertained by the High Court against the same order. The very entertainment of the review petitions, in the facts and circumstances of the case, was an affront to the order of this Court. We express our strong disapproval and hope there would be no occasion in the future when we may have to say so. The jurisdiction exercised by the High Court, under the circumstances, was palpably erroneous. The respondents who approached the High Court after the dismissal of their SLPs by this Court, abused the process of the court and indulged in vexatious litigation. We strongly deprecate the matter in which the review petitions were filed and heard in the High Court after the dismissal of the SLPs by this Court. The appeals deserve to succeed on that short ground. The appeals are, consequently, allowed and the impugned order dated 7-4-1994 passed in the review petitions is hereby set aside. The respondents shall pay Rs.10 ,000 as costs."

10. The Court below ought not and indeed could not have exercised the power of review, since the Trial Court's decree had merged with the judgment and decree of S.A.No.1117 of 1983. Had the Court below allowed the review, it would have subverted judicial discipline and laid itself open to correction under Section 115, CPC. Its jurisdiction and discretion was limited and circumscribed by the merger which had taken place.

11. The counsel alternatively invoked the power under Article 227 of the

Constitution of India. But this power of superintendence extends only over inferior Courts and Tribunals. The judgment and decree that stands today is that of this Court, over which I have no power under Article 227.

12. There can be no controversy over the proposition that Mary Roy is the law of the land. But the sharer whose share got enlarged namely the Christian female has not attacked the share as declared in the preliminary decree. The alienees have come to Court belatedly and knocked the wrong door.

13. The share declared by the Trial Court has been affirmed by this Court. So unless the order of this Court is amended the relief sought for by the petitioner cannot be granted. The Trial Court is powerless to review the preliminary decree that was declared by it after it had merged with the judgment and decree in S.A.No.1117 of 1983. The civil revision petition therefore, fails and the same is dismissed. There will be no order as to costs. The connected miscellaneous petition is also dismissed.

glp

To

The Additional District Munsif,
Nagercoil

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